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Supreme Court of The United States

October Term, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, EDWARD C. SCHMULTS, and CAROL E. DINKINS,
Appellees.

On Appeal From the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN

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BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

Public Citizen is a nonprofit, public interest organization which is currently supported by the contributions of approximately 60,000 members. Since its founding in 1971, one of its principal objectives has been assuring government accountability — the precise purpose of the Independent Counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 591-598 ("the Act").

Public Citizen also has a long history of involvement in separation of powers issues. On behalf of itself and other individuals and organizations, it has filed cases and *amicus* briefs

in a wide variety of litigation, including recent separation of powers cases resolved by this Court, *see Bowsher v. Synar*, 106 S. Ct. 2735 (1986); *INS v. Chadha*, 463 U.S. 919 (1983), as well as the early impoundment cases. *See, e.g., Train v. City of New York*, 420 U.S. 35 (1975).

In addition, Public Citizen is currently litigating several other major separation of powers cases. *See Public Citizen v. Burke*, 655 F. Supp. 318 (D.D.C. 1987) (appeal pending) (invalidating a rule requiring the National Archives to defer to all claims of executive privilege asserted by former President Nixon); *United States v. Arnold*, Crim. No. 87- 1279-B (S.D. Cal. Feb. 18, 1988) (declaring sentencing guidelines promulgated by the United States Sentencing Commission invalid as a violation of the separation of powers doctrine); *Washington Legal Foundation v. Dep't of Justice*, Civ. No. 86-2883 (D.D.C.) (challenging government's contention that application of the Federal Advisory Committee Act to the American Bar Association's Judicial Evaluation Committee would violate separation of powers principles).

Thus, both because of its institutional concern with government accountability, and because of its involvement in cases raising separation of powers questions, Public Citizen has a unique interest in, and perspective on, the issues in this case.

SUMMARY OF ARGUMENT

In assessing the constitutionality of the Act, it is vital to comprehend what the statute actually permits and requires, as well as the real-world roles performed by the Office of Independent Counsel, the Special Division of the Court, the Attorney General, and the Congress, with respect to investigations and prosecutions of high-level federal officials. That information is fully detailed in appellant's brief and will not be repeated

here. Nor will we attempt to engage in a point-by-point refutation of the arguments advanced by appellees and in the majority opinion below. Rather, we will focus on the key flaws in the court of appeals' analysis of the Act.

In our view, the most fundamental error made by the court of appeals is that it failed to recognize that its "task is not to destroy the Act if [it] can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 571 (1973). Thus, in virtually every instance where there is any doubt about the meaning of a particular provision of the Act, the court of appeals employed the interpretation most likely to do violence to principles of separation of powers, and assumed that Congress' motive was to undermine the authority of the President and the Attorney General. Moreover, the court reached out to consider hypothetical applications of various provisions of the Act that have nothing to do with this case, and it concluded that each allegedly objectionable feature, no matter how peripheral to the Act as a whole, or how speculative its application, condemned the entire statute to a verdict of unconstitutionality.

The other major error committed by the majority below is that it largely ignored the leading cases from this Court which analyze the separation of powers doctrine in a situation where, as here, Congress has not attempted to usurp executive branch powers, but has merely passed a statute which regulates the exercise of those powers. *See Nixon v. General Services Administration*, 433 U.S. 425 (1977); *see also Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986). As recognized in Judge Ginsburg's dissent, the Act represents Congress' effort to ensure that, in the narrow circumstances where the Attorney General may be biased or perceived to be biased because of his close association with persons ac-

cused of criminal behavior, there is still an effective mechanism to "take Care that the Laws be faithfully executed . . .." U.S. Const. Art. II, § 3. Because, as we explain more fully below, the mechanism selected by Congress is consistent with both the general doctrine of the separation of powers, and the specific dictates of the Appointments Clause, the Act must be upheld.

ARGUMENT

THE INDEPENDENT COUNSEL ACT IS CONSTITUTIONAL.

A. The Independent Counsel Law Does Not Contravene Any Specific Provisions of the Constitution.

Before turning to the question of whether the Act offends general separation of powers principles, we wish to make a few points with respect to the court of appeals' rulings that the statute contravenes both the Appointments Clause and Article III of the Constitution.

1. The Act Does Not Violate The Appointments Clause.

In assessing whether the Act is consistent with the Appointments Clause, the Court should, of course, begin with the language of the Constitution itself. The Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law:

> but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2. Since independent counsels are not discussed in the Clause, and since Congress is given wide discretion in determining the method of appointment for officers not specifically mentioned, the court of appeals was required to read restrictions into the Clause in order to find that the Act's procedure for appointing independent counsels is unconstitutional. The principal restriction which the court read into the Clause is that Congress did not have the power, in crafting the Act, to conclude that independent counsels are "inferior officers," and thus to select a method of appointment other than Presidential appointment and Senate confirmation.

In analyzing whether independent counsels can be inferior officers, however, the majority below unnecessarily limited its analysis to just two possible interpretations of the Appointments Clause. Initially, the court rejected, properly we believe, the contention that the only officers who must be appointed with the advice and consent of the Senate are those officers delineated in the first part of the clause, *i.e.*, Supreme Court Judges, Ambassadors, other Ministers, and Consuls. The court of appeals discarded this approach primarily because it would allow Heads of Departments and Courts of Law — who, under the last part of the clause, may be vested with the power to appoint inferior officers — to be themselves designated as inferior officers.

Having identified an apparent incongruity in one possible approach to the Clause, the court simply leaped to an interpretation at the other extreme — that, in addition to those per-

sons listed in the first part of the Clause, all officials must be appointed pursuant to the advice and consent process as long as they are not, in the view of a reviewing court, "thought subordinate to a principal officer." Slip op. at 17. The court of appeals made no effort to explain how this "functional interpretation" of the Clause, *id.*, is consistent with the language of the Clause itself, which authorizes the members of Congress, not the courts, to decide the method of appointment of "such inferior Officers as they think proper." Moreover, the majority below attempted to reconcile its interpretation with *Ex parte Siebold*, 100 U.S. 371 (1888), by simply asserting that the election officials involved there — who were not subordinate to any principal officer — performed duties that were "relatively modest," while "the independent counsel's authority is so broad as to compel the conclusion that she is a principal officer . . .." Slip op. at 21. The court's failure to articulate any objective standards for distinguishing between "modest" and "broad" duties suggests that its "functional" approach amounts to little more than free-floating, judicial second-guessing of Congress' determination of how a particular appointment should take place.

The court of appeals functional test is also inconsistent with its rejection of another argument advanced by appellant below — that the Attorney General has granted parallel appointments to other independent counsels, and these appointments have been sustained by the court of appeals. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, No. 87-869 (Jan. 19, 1988). As the United States has noted, such parallel appointments grant independent counsels the "*full authority* conferred by their court appointments." Court of Appeals Brief of United States at 2 (emphasis added). It is difficult to see how, under a "functional" approach to the Appointments Clause, which focuses primarily on the "magnitude of the task" performed by a particular official, slip op. at 23, an independent counsel appointed by a court can be labeled a principal officer, while another independent counsel, performing functionally identical tasks, but appointed by the Attorney General, can be deemed an inferior officer.

Unfortunately, the court of appeals failed to consider seriously the most plausible and straightforward construction of the Appointments Clause. Under this approach, the officers listed in both the first and last parts of the clause, *i.e.*, Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court and the Courts of Law, and the Heads of Departments, must be appointed by the President with the advice and consent of the Senate. Such an approach is clearly compatible with the language of the Clause and also eliminates the anomaly perceived by the court of appeals, in which an inferior officer can be given the power to appoint other inferior officers.

As to all other officials, Congress has considerable latitude in determining which method of appointment it "think[s] proper" for the legislative scheme being crafted — in other words, whether the advice and consent process is needed or whether a particular appointment should be vested "in the President alone, in the Courts of Law, or in the Heads of Departments." Moreover, far from being the Congressional aggrandizement of power perceived by the majority below, such a decision amounts to a relinquishment by Congress (or, more precisely, the Senate) of its advice and consent function.

In a footnote, the court of appeals dismissed this approach to the Appointments Clause, calling it a misguided suggestion that the courts "defer to Congress' interpretation of the Constitution . . .." Slip op. at 23 n. 20. But that characterization misses the point: that the Framers themselves decided to "defer to" Congress' method of selection of all officials other

than the principal officers actually enumerated in the Clause. It is not, therefore, Congress' "interpretation of the Constitution" which the courts should respect, *id.*, but, rather, Congress' exercise of the discretion that is granted to it by the plain language of the Appointments Clause. Instead of deferring to Congress' reasonable exercise of discretion in this case, the court of appeals simply discarded Congress' choice in favor of its own preference for the appointment of independent counsels — a preference which is predicated on an inherently subjective, "functional" test that simply has no grounding in the language or background of the Appointments Clause itself.

Moreover, the fact that a particular appointment process is permitted by the language of the Appointments Clause does not, contrary to the court of appeals' suggestion, give Congress the "final say" in cases of constitutional adjudication. Slip op. at 23. The appointment issue must still be considered, along with all other aspects of the statute under review, in assessing whether there is so significant a shift in the balance of power among the branches of government as to amount to a subversion of the separation of powers contemplated by the Framers of the Constitution. As Judge Ginsburg noted in her dissent, "[a]n inter-branch appointment would indeed fail the test of congruity [suggested by this Court in *Siebold*, *supra*] if it violated the separation of powers doctrine." Slip op. at 34. But, as noted earlier, a decision by Congress to give up its advice and consent power, and instead vest the authority to appoint in the President alone, or in another executive or judicial official, is unlikely to offend the principles underlying the separation of powers doctrine. And, as we will explain more fully below, *see infra* at 16-25, the legislative scheme at issue here, when viewed as a whole, plainly does not run afoul of those principles.

2. The Act Does Not Violate Article III.

Appellees argued below, and the court of appeals held, that the Act violates Article III of the Constitution by imposing non-judicial duties on the federal judiciary. In essence, the court found that federal courts are permitted only to decide "cases or controversies," but that the Act requires a special court to undertake activities which are divorced from that core judicial function. Slip op. at 75.

As noted above, however, the Constitution explicitly provides that, in addition to deciding "cases or controversies," courts may, when directed by Congress, appoint inferior federal officers. Art. II, § 2, cl. 2. And this Court has recently held that courts may also, in some circumstances, appoint prosecutors even when Congress has not authorized such appointments. *See Young v. United States*, 107 S. Ct. 2124 (1987). Moreover, the powers on which appellees and the court below have focused — the definition of the independent counsel's jurisdiction and the termination of the independent counsel's office following completion of an investigation — are logical adjuncts of the power of appointment. It is difficult to fathom a reason, and neither the court below nor appellees have made any effort to offer one, why the Framers would allow a court to create a federal office by appointing an independent counsel, but foreclose it from playing any role in defining the independent counsel's jurisdiction pursuant to a request made by the Attorney General, or in terminating the office it created.

Tellingly, the United States, in its brief below, acknowledged that courts may "discharge non-judicial functions" in the course of managing "judicial business" under Article III, Court of Appeals Brief of United States at 41, yet it nowhere explained why courts cannot discharge functions which are related to, and in support of, their Article II appointment powers, as they do under the Act. The United States has also never ex-

plained how it can reconcile its Article III stance in this case with its views of other recent statutory schemes, most notably the statute that creates the United States Sentencing Commission and directs it to establish binding guidelines for sentencing persons convicted of federal crimes. That statute specifically requires that "[a]t least three of the [seven] members [of the Commission] shall be Federal judges," and also states that "[a] Federal judge [may] serve as a member of the Commission without resigning his appointment as a Federal judge." 28 U.S.C. §§ 991, 992.

In a letter to the Chairman of the Sentencing Commission, the Justice Department's Office of Legal Counsel analyzed the constitutionality of the Sentencing Commission, and concluded that, although its "functions plainly are not judicial in nature," it is still "constitutionally permissible" because "service by an active federal judge as an officer in the executive branch is consistent with the constitutional principle of separation of powers." (The relevant portion of the memorandum is included in the Addendum to this brief). The Justice Department is now defending the statute on that basis, in response to constitutional attacks by defendants in criminal cases. *See, e.g.*, Brief of United States at 17-18, *United States v. Molander*, No. 88-CR-2-S (W.D. Wis. Brief Filed, Feb. 26, 1988). If federal judges may sit on executive commissions and issue substantive, binding rules governing sentences for all persons convicted of federal offenses, it is difficult to see how the Constitution can be violated if judges are involved in appointing independent counsels, fixing the precise terms of their jurisdiction in accordance with the Attorney General's request, and ordering the termination of their offices when their work is completed.

Finally, as in its analysis of almost all of the issues, the court of appeals' consideration of the Article III question is flawed

by its willingness to reach out and rule on potential applications of the Act that not only have no concrete relationship to this case, but which represent extreme, worst-case hypotheticals of such applications. For example, the court of appeals postulated that, under section 596(b)(2) of the Act, the Special Division could "terminate, perhaps abruptly, the entire office, to disavow all the independent counsel's efforts and halt ongoing proceedings . . . ." Slip op. at 82. Obviously, that has not occurred in this case or in any other independent counsel investigation that has been undertaken to date. Nor is it likely that the Division will ever be called on to abruptly terminate the activities of a "runaway" independent counsel, yet the majority below saw no impediment to condemning the Act on that basis. *Id.* As this Court has noted, however, it is far "wiser to delay passing upon the constitutionality" of such an extreme application of a statute until it actually transpires — if it ever does. *Watson v. Buck*, 313 U.S. 387, 402 (1941). In short, this Court should not be willing, as was the court of appeals, to render what is equivalent to "an advisory opinion on a statute or a declaratory judgment upon a hypothetical case." *Id.*[1]

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[1]The court of appeals' belief that its approach is countenanced by *Bowsher v. Synar*, 106 S. Ct. 3181 (1986),is misplaced. Slip op. at 81-82. In that case, this Court held that the prospect of Congressional removal of the Comptroller General created a "here-and-now" subservience. *Id.*, 106 S. Ct. at 3189. In this case, in contrast, the Special Division cannot remove an independent counsel, and it makes no sense to suggest that, because the Division could conceivably take the drastic step of terminating the office of a "runaway" independent counsel, then all independent counsels must have a "here-and-now" subservience to the Division. Moreover, appellees have not argued, nor can they, that the Division's theoretical role in terminating maverick independent counsels has had any effect whatsoever on the activities of appellant, let alone that she has taken some action with respect to them that she would not otherwise have taken in the absence of the Division's responsibilities under the Act.

B. The Act Does Not Violate The Doctrine of Separation of Powers.

1. The Principle of Separation of Powers

In arguing that the Act offends the doctrine of separation of powers, appellees and the United States have relied on what this Court has characterized as an "archaic view of the separation of powers . . . requiring three airtight departments of government." *Nixon v. Administrator of General Services*, *supra*, 433 U.S. at 442. In essence, the court of appeals found that, because prosecutorial functions are assigned by the Constitution solely to the executive branch, they are entirely immune from any form of control by Congress, even through duly enacted statutes of general applicability. But that antiquated approach to the separation of powers doctrine has been rejected as "inconsistent with the origins of th[e] doctrine, recent decisions of the Court, and the contemporary realities of our political system." *Id.* at 441. Instead, this Court has developed a "pragmatic, flexible" approach which has two related themes. *Id.* at 442; *see also United States v. Nixon*, 418 U.S. 683, 707 (1974).

First, the Court has consistently guarded against "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). Accordingly, in *every* case in which the Court has found a separation of powers violation, one branch of government has attempted to usurp powers which have been vested by the Constitution in another branch. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-588 (1952), the Court held that the President could not exercise legislative authority belonging only to Congress. Likewise, in a series of cases — which were erroneously relied on by appellees and the court of appeals — the Court held that Congress cannot

enact laws, while keeping for itself the power to participate in the execution of those laws, either by retaining a veto over their implementation, *INS v. Chadha*, 462 U.S. 919 (1983), or by reserving for itself the power of removal of the officer charged with executing them. *Bowsher v. Synar*, *supra*, 106 S.Ct. at 3188; *see also Myers v. United States*, 272 U.S. 52 (1925) (conditioning removal of executive branch official on Senate approval is unconstitutional); *Buckley v. Valeo*, *supra* (Congress cannot attempt to control the execution of the laws by appointing executive branch officials itself).

It is clear, therefore, that this Court has been primarily concerned with the excessive concentration of power in the hands of one branch of government, and has specifically sought to prevent Congress from "[giving] power to the executive and then [taking] it back . . .." *Ameron, Inc. v. Army Corps of Engineers*, 809 F.2d 979, 994 (3d Cir. 1986). However, where, as here, Congress has not attempted to usurp executive power, but has merely enacted laws which set standards for the exercise of that power, this Court has taken an entirely different, and far less rigid approach, to the separation of powers doctrine. Thus, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court upheld a statute which permitted the President to remove an executive branch official only for inefficiency, neglect of duty, or malfeasance in office," and in *Bowsher v. Synar*, the Court noted that its ruling was not intended to cast doubt on the validity of statutes limiting the reasons the President may remove members of independent agencies. 106 S. Ct. at 3188 n.4.

The leading case that analyzes the separation of powers doctrine in the context of a statute that regulates, but does not usurp, executive functions is *Nixon v. GSA*, *supra*, which was first cited by the majority opinion below on page 58 and essentially ignored thereafter. That case involved President Nix-

on's challenge to a statute that intrudes far more into the executive branch than the independent counsel provisions of the Ethics in Government Act. In enacting the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2111 note (the Materials Act"), Congress required the National Archives to take "possession and control" of all tape recordings and documents of the Nixon Administration and to develop regulations providing for public access to those materials with certain limited exceptions. *Id.*

Relying on essentially the same view of the separation of powers doctrine which the court of appeals accepted here, President Nixon contended that Congress could not regulate the disposition of his papers because the three branches of government are "totally distinct and autonomous, and . . . the separation of powers doctrine bars action by one branch that even indirectly impinges upon another." *Nixon v. GSA*, 408 F. Supp. 321, 341 (D.D.C. 1976) (three-judge court). However, that formulation was rejected by the Court, which instead endorsed a pragmatic balancing test:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S. at 711-712 . . . Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

433 U.S. at 443. Refraining from considering "future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents,"

the Court found that "nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face." *Id.* at 445. Reinforcing this finding, according to the Court, was the fact that President Ford had signed the Materials Act into law, as well as the fact that implementation of the Act was committed, in the first instance, to an executive branch official, the Administrator of GSA. *Id.* at 441. Moreover, the Court found that "substantial public interests" were furthered by the Materials Act, including preservation of the "[Nixon] materials for legitimate historical and governmental purposes," as well as the need to

> restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to appellant's resignation, and Congress' need to understand how those political processes had in fact operated in order to gauge the necessity for remedial legislation.

Id. at 453. Because Congress' legitimate interests in passing the Materials Act easily outweighed any interference with executive branch functions, the Court concluded that there was no violation of the separation of powers doctrine.

Recently, in *Commodity Futures Trading Comm'n v. Schor*, *supra*, this Court reaffirmed the approach taken in *Nixon v. GSA*. That case involved a statute bearing on judicial rather than executive power, but the Court engaged in essentially the same analysis as it did in assessing the constitutionality of the Materials Act. Thus, the Court stressed that, "[u]nlike *Bowsher*, this cases raises no question of the aggrandizement of congressional power at the expense of a coordinate branch." 106 S. Ct. at 3261. Accordingly, the Court considered whether the statute excessively "intrude[d] on the province of the judiciary," and, finding that it did not, concluded that there

was no "genuine threat" to separation of powers principles. *Id.* at 3258, 3261.

As we now demonstrate, because the same basic factors that persuaded this Court to uphold the statutes at issue in *Nixon* and *Schor* are present here, the Court should conclude that the Independent Counsel Act also does not violate the doctrine of separation of powers.

2. Congress Has Not Usurped Any Executive Branch Powers.

To begin with, this is plainly not a case in which Congress has attempted to usurp executive power. Nothing in the Act authorizes Congress to exert any control, either directly or indirectly, over executive branch functions. Under the statute, Congress does not participate in the appointment or removal of independent counsels, nor does it retain any control over the scope or outcome of investigations or prosecutions. In fact, Congress' role is expressly restricted to routine oversight functions of the kind that it undertakes on an almost daily basis with regard to all federal agencies, including the Department of Justice. *See* 28 U.S.C. § 595. No plausible argument can be constructed that this oversight function alone constitutes legislative encroachment on executive branch activities, and thus the core factor which has triggered *every* Supreme Court finding of a separation of powers violation is simply not present here.

In an effort to avoid this conclusion, the court of appeals advanced an argument that actually highlights the inconsistency between its rigid approach to the separation of powers doctrine and the more flexible view which has been taken by this Court. Thus, while acknowledging that the Act does not directly add to any of Congress' powers, slip op. at 66, the court went on to opine that:

> it seems simplistic to contend that Congress' political power in our system is unaffected by a diminution (or increase) in the Chief Executive's authority. If the President's authority is diminished — and we think it utterly impossible to deny that the Act accomplishes at least that result — Congress' political power must necessarily increase vis-a-vis the President.

Id. at 67. But that analysis can obviously be applied to *any* law that regulates or influences executive authority, and thus it would, if accepted, compel invalidation of numerous statutes which this Court has heretofore found to be compatible with the doctrine of separation of powers. For example, in the course of upholding the Materials Act in *Nixon v. GSA*, the Court noted that, "of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch" — such as the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, the Federal Records Act, and a variety of other statutes — and "[s]uch regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy." 433 U.S. at 445. Under the court of appeals' analysis, however, all of these statutes, as well as the Materials Act itself, must be regarded as diminishing executive branch discretion to withhold its materials from the public, and thereby impermissibly increasing "Congress' political power . . . vis-a-vis the President." Slip op. at 67. It could hardly be clearer that the court of appeals' approach to the separation of powers doctrine is completely out of sync with the precedents and principles that have been established by this Court on the issue of Congressional aggrandizement.

3. Implementation Of The Act Is Committed To The Executive Branch.

As in *Nixon v. GSA*, implementation of the Act is committed to the executive branch. Thus, only the Attorney General can apply for appointment of an independent counsel, and he is required to do so only if he determines that (1) the investigation concerns either a high government official specifically enumerated in the Act or another government official whose investigation or prosecution by the Justice Department may present a personal, financial, or political conflict of interest; (2) there is sufficient credible information to undertake a preliminary investigation; and (3) there are reasonable grounds to conclude that further investigation and prosecution is appropriate. 28 U.S.C. §§ 591, 592. If, after completing a preliminary investigation, the Attorney General finds that "there are no reasonable grounds to believe that further investigation or prosecution is warranted . . . the division of the court shall have no power to appoint an independent counsel." *Id.* at § 592(b)(1). In the course of amending the Act in 1987, Congress made it crystal-clear that the "Attorney General's determinations under the [Act] are not subject to judicial review." H. Conf. Rep. No. 452, 100th Cong., 1st Sess. 22 (1987).

Simply stated, an independent counsel cannot even exist unless the Attorney General, an executive branch official, makes several separate determinations which fall entirely within his discretion. Likewise, the Attorney General alone is authorized to remove an Independent Counsel from office, although such removal must be based on "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." *Id.* at § 596(a). Moreover, although appellant is not subject to the day-to-day control of the Attorney

General, she is required to "comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." 28 U.S.C. § 594(f). Accordingly, while the statute does not explicitly say so, independent counsels are properly regarded as members of the executive branch, as the court below acknowledged. Slip op. at 20, 50. Indeed, the Justice Department admitted as much when, in 1987, it attempted to require all independent counsels to comply with conflict of interest rules applicable to officials within the Department. *See* H.R. Rep. No. 316, 100th Cong., 1st Sess. 29 (1987) ("House Report").

Overall, therefore, the only substantive role that any branch of government (outside the executive branch) has in the entire Act involves the power of the special court to actually name an independent counsel and fix his or her jurisdiction. However, because the court must name an independent counsel whenever the Attorney General requests that it do so and may not make an appointment in the absence of such a request, 28 U.S.C. § 593(b), and because the definition of the counsel's mission must be based on information submitted in the Attorney General's application, *id.* at § 592(d)(1), the court's tasks are largely ministerial and pale in comparison with the important, discretionary responsibilities assigned to the Attorney General. Moreover, since, under *Young v. United States*, *supra*, federal courts have the inherent power to appoint private attorneys to prosecute contempt actions, even where the executive branch declines or opposes prosecution, then it certainly does not violate the separation of powers doctrine for a special court, acting pursuant to statutory directives, to appoint an independent counsel where the Attorney General expressly requests such an appointment.[2]

[2]In light of *Young*, it is also clear that the court of appeals was wrong in asserting that "the Constitution vests the power to initiate a criminal prosecution exclusively in the Executive Branch." Slip op. at 26.

Thus, as in *Nixon v. GSA*, the executive branch remains firmly in control in implementing the statutory scheme at issue. As a result, the only arguable claim that may be advanced by appellees is that there is improper impairment of the Attorney General's power because independent counsels operate largely autonomously in the actual investigation and prosecution of offenses. We do not suggest, of course, that the Act causes *no* diminution of the Attorney General's authority, but, as *Nixon* and *Schor* make clear, that is not the proper test. Rather, the Court must examine the extent of the impairment, balance it against the interests served by the law, and ultimately determine whether the intrusion into executive branch functions is excessive. If that test is applied here, the Act must be sustained.

First, the diminution of the Attorney General's power is small because independent counsels can be appointed only to investigate and prosecute certain offenses committed by a narrow class of officials, and only following a request by the Attorney General. In addition, independent counsels can pursue only specific, discrete investigations, and their offices are terminated once those investigations are completed. Any intrusion which is occasioned by such limited investigations "can only be termed *de minimis*." *Commodity Futures Trading Comm'n v. Schor*, *supra*, 106 S. Ct. at 3260 (1986).

In addition, just as this Court deemed it noteworthy in *Nixon v. GSA* that President Ford had signed the Materials Act into law, 443 U.S. at 441, it is likewise probative that President Carter approved the Act.[3] It is also significant that, as the United States tacitly acknowledges, President Reagan

[3]Contrary to the court of appeals' implication (slip op. at 63), the majority of both Houses of Congress was from the same party as President Carter when the Act was first passed in 1978.

and the Department of Justice have endorsed independent investigations in all of the cases currently being pursued by independent counsels, even to the point of offering them parallel appointments under which they can "enjoy the *full authority* conferred by their court appointments." Court of Appeals Brief of United States at 2 (emphasis added). While the appellant declined such an appointment here, the fact that the Justice Department was — and remains — willing to give her the identical authority that she has under the Act, demonstrates that the statute has not, to date, operated in a fashion that interferes with executive branch prerogatives. Of course, there may come a time when a particular investigation is not so favorably regarded by incumbent executive officials, but such "hypothetical horrors" are not presently before the Court. *Nixon v. GSA*, *supra*, 408 F. Supp. at 341.

At bottom, the Act intrudes far less into executive branch functions than the statute at issue in *Nixon v. GSA*. In contrast to the Materials Act, which imposes sweeping, mandatory duties on executive branch officials, the Act is a narrowly drawn and carefully crafted statute which intrudes on executive operations to the minimum extent necessary to achieve its legitimate objectives. As we now demonstrate, the public interests served by the statute are at least as compelling as those furthered by the Materials Act, and Congress reasonably concluded that they could not be accomplished without the safeguards contained in the Independent Counsel law.

4. Congress Reasonably Determined That The Act Serves Substantial Public Interests.

Following the Watergate abuses, including the abrupt dismissal of special prosecutor Archibald Cox, Congress held extensive hearings and concluded that "[n]o one who has watched 'Watergate' unfold can doubt that the Justice Depart-

ment has difficulty investigating and prosecuting high officials, or that an independent prosecutor is freer to act according to politically neutral principles of fairness and justice." S. Rep. No. 170, 95th Cong., 2d Sess. 3 (1977) ("Senate Report"), *quoting Watergate Special Prosecution Force Final Report* at 137-138. Moreover, Congress wanted investigations of high government officials to conform to the "basic tenet of our legal system that a lawyer cannot act in a situation where he has a conflict of interest," and, by the same token, it wanted to alleviate the "harm to the morale and self-esteem of the employees of the Department" of Justice which "is caused when the senior attorneys in the Department feel compelled to act in the face of a conflict of interest instead of abstaining as our normal principles of ethics require." Senate Report at 7. Finally, Congress was convinced that the "mere existence" of the Act could "act as a substantial deterrent to extreme situations such as Watergate," and could thereby help in restoring public confidence in government. *Id.*

This Court's recent decision in *Young v. United States*, *supra*, confirms the importance of the interests served by Act. In reaffirming that federal courts may appoint private attorneys to prosecute criminal contempt actions, the Court reasoned that "[i]f the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that branch declined prosecution." 107 S. Ct. at 2134. The rationale for the appointment of independent counsels is at least as powerful; Congress has determined that the nation cannot be entirely dependent on high executive officials to investigate and prosecute crimes where there is an actual or potential conflict of interest.

Indeed, another facet of the Court's ruling in *Young* highlights this very concern. While the Court found that courts have the authority to appoint private attorneys to prosecute

contempt actions, it also concluded that courts may not assign that responsibility to interested parties. *Id.* at 2135. Such assignments "at a minimum create[] *opportunities* for conflicts to arise, and create[] at least the *appearance* of impropriety." *Id.* at 2137 (emphasis in original). Moreover, *Young* held that the appointment of an interested person as a prosecutor is an error that is "so fundamental that [it] require[s] reversal [of the underlying criminal conviction] without regard to the facts or circumstances of the particular case." *Id.* at 2139.

Employing identical reasoning, Congress has concluded that investigations and prosecutions of high government officials must be conducted by persons who have no interest in the matter under scrutiny, *i.e.*, persons who can operate with some degree of independence from the Attorney General and the Department of Justice. Thus, the rules which Congress has laid down for independent counsels stem from essentially the same interests as the rules which this Court has ordained with regard to the appointment of special counsels to prosecute criminal contempt.

Congress' concern with conflicts of interest, as well as the appearance of such conflicts, also led it to conclude that the use of an independent counsel who is "free from any conflict of interest would result in public acceptance of a decision not to prosecute that may be entirely justified on the merits . . ." Senate Report at 10. Accordingly, the law safeguards the public reputation of *targets* of independent counsel investigations who are not subsequently prosecuted, whereas "the same decision made by the Attorney General who has a conflict of interest, or the appearance thereof, might breed public distrust of the decision not to prosecute," as well as suspicion about the individual who is not prosecuted. *Id.* By way of illustration, it is unlikely that the incumbent Attorney General would have been confirmed for his position if, in 1984, an in-

dependent counsel had not cleared him of criminal wrongdoing in connection with various financial transactions. *See* House Report at 16.

In rejecting Congress' determination that the Act is needed, the court of appeals committed several significant errors. First, rather than respond to Congress' specific finding that the Justice Department has had, and will continue to have, difficulties in investigating and prosecuting high executive branch officials, the court instead elected to merely define away the problem that Congress was striving to solve. Thus, without providing any explanation, the court asserted that an investigation by officials in the Justice Department into potential illegalities committed by their own colleagues is not "truly a conflict of interest . . . as we judges and lawyers think of the phrase." Slip op. at 61. But, more importantly, the court's reflection on what "judges and lawyers think of" as a conflict of interest does not eliminate either the real-world problem that Congress was attempting to attack, or the fact that the Act represents an effective — perhaps the only effective — response to that problem.[4]

Equally objectionable is the court's rejection of Congress' conclusion that "structural techniques" like the Act can help

[4]Ironically, while belittling Congress' concern with avoiding conflicts of interest in the executive branch, the court of appeals incorporated virtually the same concern into its Article III analysis. Thus, in concluding that the establishment of a Special Division is "particularly troubling," the majority below raised the specter of a defendant "offending the [reviewing] court by pointing too vigorously to alleged overreaching by fellow judges or by an officer appointed by and supervised by fellow judges." Slip op. at 86. It is difficult to understand why the "possible influence of this court's respect for its colleagues [on the Special Division]" constitutes a grave problem, slip op. at 86, yet the "possible influence" of the Attorney General's "respect" for his colleagues on the investigation and prosecution of alleged criminal behavior does not represent such a problem.

to prevent "national nightmare[s]" such as Watergate. Slip op. at 62. Even though Congress conducted extensive hearings and concluded that the existence of the Act would, in fact, "act as a substantial deterrent" to lawlessness in the executive branch and even to "extreme situations like Watergate," Senate Report at 7, the majority below, without even reviewing the testimony and materials considered by Congress, simply declared that *it* did not agree with this rationale for the Act.

Likewise, the Court's pronouncement that "prosecuting Presidents" cannot "be made relatively painless," slip op. at 63, ignores Congress' determination — again based on extensive testimony and factual exploration — that the Act may obviate the need for impeachment proceedings and avoid constitutional confrontations. As noted earlier, Congress determined that if a President is placed in the untenable position of overseeing an investigation or prosecution of his own subordinates, the opportunities for the President to become tainted — at least with an appearance of a conflict of interest — are thereby increased. Congress, therefore, made the reasonable judgment that inter-branch conflicts, and, ultimately, the need to threaten or resort to impeachment, could be lessened through the Act.

In short, the court of appeals blatantly — and improperly — substituted its own public policy and legislative-type judgments for those made by Congress. After due deliberation, Congress reasonably concluded that the Independent Counsel Act serves "substantial public interests," *Nixon v. GSA*, 433 U.S. at 443, and those interests afford a more than adequate basis for sustaining the law.

CONCLUSION

The decision of the court of appeals should be reversed, and the Court should uphold the constitutionality of the Act.

Respectfully submitted,

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ADDENDUM

MEMORANDUM FOR JUDGE WILLIAM W. WILKINS, JR., CHAIRMAN, UNITED STATES SENTENCING COMMISSION

This memorandum responds to your request of December 1, 1986, for the Attorney General's opinion on the questions whether the United States Sentencing Commission has statutory authority to issue guidelines governing judicial imposition of capital punishment and whether such guidelines would be binding on the federal courts. The Attorney General has referred your request to this Office for response. See 28 C.F.R. 0.25.

At the outset, we must address the question whether this Office has authority to respond to the Commission's request. Because the Attorney General is empowered to render legal advice only to the various components of the executive branch of government, see 28 U.S.C. 511 (the President); 28 U.S.C 512 (the heads of executive departments); 28 U.S.C. 513 (Secretaries of military departments), this Office can provide an opinion to the Sentencing Commission only if the Commission is within the executive branch.

I. THE SENTENCING COMMISSION IS WITHIN THE EXECUTIVE BRANCH

The question of our jurisdiction arises because Congress has labeled the Sentencing Commission "an independent Commission in the judicial branch" of government. 28 U.S.C. 991(a). Notwithstanding the

label attached by Congress, however, we believe that the Sentencing Commission is an executive agency. The Supreme Court's recent decision in *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), makes clear that the label that Congress attaches to a governmental entity does not govern the branch in which the entity resides; rather, the functions performed by the agency determine its character as an executive, legislative, or judicial agency. Thus, in *Bowsher*, the Court acknowledged that "Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch" and that several statutes explicitly identify the Comptroller General as "'a part of the legislative branch of Government.'" *Id.* at 3191. But, because the Balanced Budget and Emergency Deficit Control Act of 1985 assigned to the Comptroller General "an executive function," the Court held that he had to be treated under the Constitution as an executive officer for purposes of that statute. *Id.* at 3192. Accordingly, we turn to an examination of the functional character of the Sentencing Commission.

The Sentencing Commission is charged with establishing a range of appropriate penalties for violations of federal criminal statutes, based upon the factors and criteria that Congress has directed the Commission to consider. See 28 U.S.C. 994.[1] This task necessarily involves the Commission's interpretation and elaboration of the standards enunciated by Con-

[1] The statute requires the Commission to carry out legislative policy according to an "intelligible principle" laid down by Congress in a statute; it therefore appears to constitute a proper delegation of authority to the Commission. *J.W. Hampton and Company v. United States*, 276 U.S. 394 (1928).

gress. Furthermore, in establishing guidelines for use by sentencing courts, the Commission promulgates rules of decision, just as, for example, the Occupational Safety and Health Administration (as well as a host of similar administrative agencies) promulgates rules of decision when it sets out schedules of penalties for the substantive violations of the statute it administers.

The Sentencing Commission's functions plainly are not judicial in nature. Article III of the United States Constitution limits "the judicial Power" of the United States to the resolution of cases and controversies.[2] U.S. Const. Art. III, sec. 2, cl. 1. The judicial branch clearly includes the federal courts that exercise this power, as well as certain judicial adjuncts employed under the direct supervision of the courts. See *United States v. Raddatz*, 447 U.S. 667 (1980). By contrast, the Sentencing Commission does not resolve cases or controversies.[3] We conclude, therefore, that the Sentencing Commission may not be placed in the judicial branch.

[2] To be sure, in the criminal law context, the resolution of cases and controversies includes the imposition of sanctions prescribed by law. When a range of permissible sanctions is prescribed by statute, determining which sanction within the range shall be imposed on a particular defendant is a judicial function. Determining the range of permissible sanctions for a particular violation, however, is a lawmaking function, which can be performed only by Congress or by the executive branch pursuant to an appropriate delegation. See note 1, *supra*.

[3] The Commission is also unlike the various Judicial Councils, which deal with the management of their respective judicial circuits, see 28 U.S.C. 331. These bodies consist of judges dealing collectively with the necessary chore of administering the courts to which they belong.

Moreover, under the reasoning of *Bowsher*, it seems clear that the Sentencing Commission must reside in the executive branch. In *Bowsher*, the Supreme Court held that the Comptroller General's "exercise [of] independent judgment and evaluation with respect to . . . estimates" of "federal revenues and expenditures" for purposes of triggering deficit reduction requirements constitutes the "execution of the law in constitutional terms." 106 S. Ct. at 3192. In so concluding, the Court relied on the fact that the Comptroller General had to "interpret the provisions of the [relevant] Act to determine precisely what budgetary calculations are required" and that such decisions "are typically made by officers charged with executing a statute." *Id.* In this respect, the Court remarked that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Id.* Accordingly, the functions of the Commission – interpreting the policies, standards, and criteria laid out by Congress to implement the legislative mandate of providing narrower discretion in federal criminal sentencing – fall within Bowsher's construction of what constitutes an executive function. We therefore conclude that the Commission is an executive agency and that this Office has authority to render the requested legal advice.[4]

[4] Because 28 U.S.C. 991 provides that "[a]t least three of the members [of the Commission] shall be Federal judges" and 28 U.S.C. 992 permits "[a] Federal judge [to] serve as a member of the Commission without resigning his appointment as a Federal judge," the question arises whether service by an active federal judge as an officer in the executive branch is consistent with the constitutional principle of separation of powers. Although two Circuits have split on this question, compare *Matter of President's Commission on Organized Crime, Subpoena of Nicodemo Scarfo*, 783 F.2d 370, 380-81 (3d Cir. 1986) (upholding

the constitutionality of the service of an active judge as Chairman of the President's Commission on Organized Crime), with *In re Application of President's Commission on Organized Crime, Subpoena of Lorenzo Scaduto*, 763 F.2d 1191, 1196-98 (11th Cir. 1985) (finding that a judge's service on that commission would engender an impermissibly "pro-government perspective . . . ill-suited to [the judge's] obligation to be neutral in the courtroom"), this Office has consistently taken the position that the service of individual judges in executive agencies is constitutionally permissible. See *e.g.*, Memorandum for the Associate Attorney General, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, August 24, 1983, at 1-2 n. 2; see also Memorandum for Ramsey Clark, Assistant Attorney General, Lands Division, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, November 27, 1963, at 1 ("Whether the President should call upon Federal judges to engage in nonjudicial functions is basically a matter of policy."). Indeed, no other conclusion seems plausible given the text of the Constitution and the long history of extrajudicial service by active federal judges. Specifically, because the Incompatibility Clause expressly applies to members of Congress and omits any reference to members of the judiciary, that provision suggests, by negative implication, that there is no constitutional bar to the service of a judge in an executive branch position. See Art. II, sec. 6, cl. 2 ("[N]o Person holding any Office under the United States . . . shall be a member of either House during his Continuance in Office."). There is also ample historical precedent for the personal service of a judge in an executive capacity from the period immediately after the framing of the Constitution. For example, Chief Justice Jay served as special envoy to England and negotiated Jay's Treaty; Chief Justice Ellsworth served as Minister to France during part of his judicial tenure; and Chief Justice Marshall was Secretary of State and Chief Justice simultaneously for a month. This list is far from exhaustive, but illustrates an important point: these men, personally familiar with the intent of the framers, found no constitutional impediment to dual executive and judicial service. We find these historical examples to be persuasive confirmation of the conclusion suggested by a textual examination of the Constitution. Of course, that certain members of the Commission are also federal judges, in no way affects the President's supervisory authority over the Commission, including his removal authority.